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No. 79-1540

In the Supreme Court of the United States

OCTOBER TERM, 1979

EDWARD SADLOWSKI, ET AL., PETITIONERS

v.

RAY MARSHALL, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

CARIN ANN CLAUSS
Solicitor of Labor

BEATE BLOCH
Associate Solicitor

LOIS G. WILLIAMS
HELENE BOETTICHER
NORRIS R. SAUNDERS
JOSEPH M. WOODWARD
Attorneys
Department of Labor
Washington, D.C. 20210

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OPINIONS BELOW

The order of the court of appeals granting the Secretary's motion for summary affirmance (Pet. App. 1a) is unreported. The opinion of the district court (Pet. App. 4a-17a) is reported at 464 F. Supp. 858.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1979, and a petition for rehearing

was denied on January 24, 1980 (Pet. App. 2a). The petition for a writ of certiorari was filed on April 2, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below erred in concluding that the Secretary's statement of reasons for declining to file suit to overturn a union election demonstrated that he had fully investigated petitioners' allegations of misconduct and that his determination was not arbitrary, capricious or an abuse of discretion.

STATEMENT

Petitioners unsuccessfully competed for international level union offices in the February 1977 United Steelworkers of America election. After exhausting internal union remedies, they complained of election misconduct to the Secretary of Labor (App. 64-144),[1] who has exclusive authority to seek judicial redress in such cases under Title IV of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 481 *et seq.*

Based on petitioners' complaint, the Secretary initiated a massive investigation of the Steelworkers' election. Two hundred and fifty investigators were assigned to the case and 5422 witnesses were interviewed. Although the complaint alleged irregularities

[1] "App." refers to the joint appendix that was filed in the court of appeals.

in only 301 United States locals, the Secretary selected 411 additional locals for investigation.[2] Petitioners also challenged some Canadian results, but the Secretary obviously could not conduct an investigation in Canada. Consequently, the Secretary secured the assistance of the Government of Canada, which convened an industrial inquiry board to investigate those allegations.

Upon completion of the investigation, which inquired into all the issues raised in petitioners' complaint, the Secretary declined to file suit and issued an 83-page Statement of Reasons supporting his decision (App. 145-233). The Statement of Reasons set forth the Secretary's investigative findings with respect to each of petitioners' allegations, in a point-by-point format, and analyzed all violations to determine whether—and to what extent—they "may have affected the outcome of [the] election" (29 U.S.C. 482(c)). A tabulation of all possibly affected votes

[2] Prior to the election, petitioners and the Union had both requested that the Department of Labor undertake full and complete supervision of the election. The Department declined to do so because, except in the case of re-elections necessitated by past election misconduct, the Department has no authority to provide such assistance. Section 402(c) of the Act, 29 U.S.C. 482(c). However, "[t]he Department did agree to provide unprecedented technical assistance" (App. 147), which included the presence of compliance officers on election day and the assistance of Department officials in tabulating election returns. Consequently, Department personnel had substantial first-hand information which assisted them in pinpointing additional locals that warranted investigation. The investigation also focused on locals that either reported lopsided returns or failed to report returns (Pet. App. 8a).

demonstrated that the violations could not have changed the outcome of the election in the United States. The Statement also noted that the Canadian investigation, over which the Secretary had no control, had not uncovered any evidence affecting the validity of his conclusions (App. 145).[3] The Secretary concluded that there had been no widespread fraud or irregularities and that, " 'on the whole, the election was conducted in accordance with the law and with the Union's constitution' " (Pet. App. 9a).

On February 14, 1978, petitioners brought this action in the United States District Court for the District of Columbia, complaining that the Secretary had failed to conduct a proper investigation, that he had breached his statutory obligation to act as their "lawyer," and that his Statement of Reasons was arbitrary and capricious (App. 1-63). The Union intervened as a defendant. The district court granted defendants' motions for summary judgment, finding that the Secretary's Statement "demonstrates that

[3] The Canadian investigation was headed by Roland Tremblay, a former provincial judge, who is also the president of both the Economic Arbitrators of Canada and the Quebec Arbitrators Conference (Pet. App. 8a). The Canadian report (App. 268-294), which petitioners received in advance of the Secretary's Statement of Reasons (App. 145), concluded that "[t]he reasonable explanations put forth by trustworthy witnesses have satisfied the Board as to the irregularities present in the documents, and do not permit one to conclude that there was any fraud, corruption, malfeasance, or even evil intent in the conduct of the constitutional election of the United Steelworkers of America, which took place in Canada on 8 February 1977" (App. 294).

each of [petitioners'] allegations was carefully investigated as were other possible violations not raised by [petitioners]" and that "[t]he investigative findings were considered and weighed in reaching the conclusion that the violations that had occurred could not have affected the election's outcome" (Pet. App. 13a). The court rejected petitioners' contention that the Secretary had failed to act as their "lawyer" and held that the Secretary had not abused his discretion by declining to file suit (Pet. App. 16a-17a). The court of appeals summarily affirmed (Pet. App. 1a).

ARGUMENT

1. In *Dunlop* v. *Bachowski*, 421 U.S. 560, 572-573 (1975), this Court held that the Secretary must give reasons for declining to file suit under Section 402(b) of the Act, 29 U.S.C. 482(b), but that judicial review must "be confined to examination of the 'reasons' statement, and the determination whether the statement, without more, evinces that the Secretary's decision is so irrational as to [be] * * * arbitrary and capricious."[4] In particular, the Court stated that "review may not extend to * * * trial of a complaining member's challenges to the factual bases for the Secretary's conclusion either that no violations occurred or that they did not affect the outcome of the election" (421 U.S. at 572-573).

[4] This Court noted in *Dunlop* v. *Bachowski*, *supra*, 421 U.S. at 574, that "review beyond the confines of the reasons statement" might be warranted in certain unusual circumstances, but the district court correctly found that no such circumstances were present here (Pet. App. 12a).

Although petitioners seek review on the ground (Pet. 16) that the Secretary's Statement of Reasons was arbitrary and capricious on its face, the thrust of their argument is that the Secretary erred by not enlarging the scope of his investigation and by not attributing greater weight to those violations that he discovered (Pet. 17-20).[5] Contrary to this Court's holding in *Bachowski*, petitioners seek to challenge the factual basis for the Secretary's decision and to have the courts substitute their judgment for that of the Secretary, despite the statute's reliance "upon the special knowledge and discretion of the Secretary for the determination of both the probable violation and the probable effect" (*Dunlop* v. *Bachowski*, *supra*, 421 U.S. at 571). In any event, the Secretary's careful investigation, which went well beyond petitioners' allegations, speaks for itself.[6]

[5] In effect, petitioners contend that they are entitled to the expanded scope of review that this Court rejected in *Bachowski*. Petitioners correctly note that the decision below (Pet. App. 14a-15a) departs from the district court's analysis in *Bachowski* v. *Brennan*, 413 F. Supp. 147 (W.D. Pa.), appeal dismissed, 545 F.2d 363 (3d Cir. 1976), with respect to the appropriate methodology for assessing the effect of ballot secrecy violations. The contrary decision of one district court does not create a conflict that warrants this Court's review.

[6] Moreover, the Secretary does not have the burden of proving to a reviewing court that the violations did not affect the election results. Petitioners' reliance (Pet. 20-21) on *Wirtz* v. *Hotel, Motel & Club Employees Union*, 391 U.S. 492 (1968), is misplaced. In *Wirtz*, this Court held only that once the Secretary has filed suit and proved the violations, the *union* must carry the burden of showing that the violations did not affect the result (*id.* at 506-509). Significantly different considerations are relevant to a court's review of the Secretary's exercise of discretion in determining whether to sue. See *Wirtz* v. *Bottle Blowers Ass'n*, 389 U.S. 463, 472 (1968).

On its face, the Secretary's Statement of Reasons shows that he thoroughly investigated and considered all of petitioners' allegations before reaching his decision (Pet. App. 13a).[7] The district court correctly held that the Secretary had not abused his discretion in declining to file suit (Pet. App. 17a), and the court of appeals correctly affirmed that ruling (Pet. App. 1a). This essentially factual question does not warrant further review.

2. Petitioners' contention (Pet. 14-16) that the Secretary breached his duty to act as their "lawyer" —by failing to keep them fully apprised of the progress of his investigation—is likewise without merit. This Court has repeatedly emphasized that the Secretary has broad discretion in this area (*Wirtz* v. *Local 125, Laborers' Union*, 389 U.S. 477, 482-483 (1968); *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964)), and it is clear that Congress did not intend to have the Secretary's discretion encumbered by requiring him to act as a partisan during the investigatory stage.[8] The Secretary must exercise in-

[7] Petitioners' criticism (Pet. 11-12) of the Canadian investigation is inapposite. The Secretary could not control the conduct of that investigation, and he received no information that affected the validity of the conclusions that his own investigation had reached (App. 145).

[8] Indeed, the Secretary's duty to be impartial during the investigatory stage is clear from the fact that union members may intervene once a lawsuit is filed, but only with

dependent judgment during the investigation and, as the district court correctly held, "[o]nly after the Secretary has [found probable cause and] instituted suit does he assume a partisan role and become an advocate for the complaining union member" (Pet. App. 16a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

CARIN ANN CLAUSS
Solicitor of Labor

BEATE BLOCH
Associate Solicitor

LOIS G. WILLIAMS
HELENE BOETTICHER
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JOSEPH M. WOODWARD
Attorneys
Department of Labor

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respect to those claims that the Secretary has judged to be meritorious, because "Congress intended to insulate the union from any complaint that did not appear meritorious to * * * the Secretary" (*Trbovich* v. *United Mine Workers*, 404 U.S. 528, 537 (1972)).

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